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No. 98-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AIRBORNE FREIGHT CORPORATION
d/b/a AIRBORNE EXPRESS,
Petitioner,

v.

JOHN M. KELLEY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. RESPONDENT'S BRIEF FAILS IN ITS EFFORT TO OBSCURE THE CONFLICT CREATED BY THE FIRST CIRCUIT'S OPINION AND TO DENY THE IMPORTANCE OF THE LEGAL ISSUE SQUARELY RAISED BY THIS CASE.

Respondent Kelley's Opposition to Petition for a Writ of Certiorari ("Opp.") is an effort to distract the Court from the important legal issue raised by this case. This Reply responds in particular to the novel arguments raised by Kelley, none of which is sufficient to obscure that this case meets the standards of Supreme Court Rule 10 and should be reviewed by the Court.[1]

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[1] At the outset, Kelley levels a barrage of accusations of "misrepresentation" of the record against Airborne. These accusations

A. The Opposition Brief Confirms the Existence of an Important Conflict Among the Circuits.

In his Opposition, Kelley acknowledges, as he must, that there is a direct conflict between the First Circuit's decision in this case and the Eighth Circuit's decisions in *Stemmons v. Missouri Department of Corrections*, 82 F.3d 817 (8th Cir. 1996), *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993) and *Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir. 1997). For several reasons, this Court should reject Kelley's attempt to minimize the importance of this conflict, an attempt which Kelley supports largely by labelling the conflict as "not intolerable" (Opp. at 16) and by distorting the Eighth Circuit's opinions.

Kelley simply cannot get around the fact that the Eighth Circuit stated that it *was error* to refuse to give a business judgment instruction when one is requested, *Stemmons*, 82 F.3d at 819, while the First Circuit stated expressly that "we find no error in the decision of the district court not to give a [requested] business judgment instruction," 32A. Put another way, the Eighth Circuit held that a business judgment instruction is "crucial to a fair presentation of . . . [an employment discrimina-

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lack substantive merit and appear to be designed to give the false impression that this case is too "fact-bound" to review. Airborne declines Kelley's apparent invitation to engage in an unnecessary and counterproductive factual debate about the record in this case. Airborne is confident that its Petition accurately characterizes the proceedings below, with one exception which Airborne would like to clarify. Kelley does correctly point out that the statement in Airborne's Petition that "the undisputed evidence at trial established that Guiod and Kelley 'hated each other's guts'" was inaccurate. However, the error was one of form—not of substance. Kelley introduced into evidence an e-mail from Airborne Senior Vice-President Van Bruwaenc to Simpson stating that "Guiod hates Kelley's guts and that don't help the situation" (A. 2315), and Kelley argued in his appellate brief that Guiod "hate[d] his guts" and that Kelley thought Guiod was a "backstabbing bastard." Kelley's Appellate Brief at 40; A. 1007, 2315.

tion] case, [and] the district court *must* offer it whenever it is proffered by the defendant." *Wolff*, 128 F.3d at 685 (emphasis added). The First Circuit has adopted a directly contrary rule.[2]

The Court should reject Kelley's attempt to minimize the conflict by blending together the separate analyses required for (1) determining whether error occurred and (2) determining whether the error was harmless or prejudicial—a different issue which is discussed in more detail below. On the question of "what is error," both the Eighth Circuit and the Second Circuit in *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26 (2d Cir. 1997), recognize that it is crucially important for the jury to understand the role of the employer's business judgment, and that it is error not to give a requested instruction.[3]

Notably absent from Kelley's Opposition are any of this Court's decisions on the importance of the jury's correct understanding of the role of the employer's business judgment, and thus, by extension, the extreme importance of the type of instruction requested by Airborne. Also absent is any reference by Kelley to Congress's intent and the purpose of the ADEA, both of which are key to understanding the importance of this case. Airborne

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[2] Kelley again attempts to divert the Court by noting the irrelevant point that "[t]he First Circuit *did not* hold that it would be error to give a business judgment instruction." Opp. at 17. By focussing on what the First Circuit did not hold, Kelley avoids the disturbing policy implications of what it did hold—that it is not error for a trial judge to refuse to give a business judgment instruction when the employer's business judgment is directly at issue under the pretext analysis required by *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and its progenitors.

[3] In *Thornley*, the Second Circuit rejected the notion that the failure to give correct instructions could be harmless when the instructions given "permitted the jury to infer discrimination based upon whether the jury found the employer's standards to be reasonable." 104 F.3d at 30. Airborne stands by the conclusion that *Thornley*'s holding is essentially on all fours wit· the Eighth Circuit's position.

refers the Court again to pages 15-23 of its Petition for a discussion, which Kelley has left completely untouched, on the importance of the jury receiving a business judgment instruction in a pretext case such as this.[4] But it is worth again quoting this Court in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), where it is stated: "Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review." *Id.* at 524.

B. The Prospect of Conducting a Harmless Error Analysis Does Not Make This Case Any Less Worthy of Certiorari Review.

Contrary to the implication of Kelley's suggestion that this Court would need to "review a 2,500 page record

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[4] There is no merit to Kelley's surprising attempt to assert that the present case, which Kelley tried as a "pretext case" and which the Court considered a "pretext case," is not in conflict with the Eighth Circuit's decisions because the present case is really a case in which age bias has been proven through the direct evidence approach elucidated by the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). It is simply not true that Kelley "presented evidence which had a direct bearing on the issue of age discrimination," and that the jury's answer to Interrogatory No. 2 was based solely on this evidence. Opp. at 8. As the First Circuit noted in its Opinion No. 1, the evidence of age bias was "*indirect* and far from overwhelming." 57A (emphasis supplied). This case was tried under the circumstantial evidence, tripartite burden shifting framework for disparate treatment cases elucidated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *Hicks*, not on a *Price Waterhouse* "direct evidence" model. The trial court's jury instructions tracked the *McDonnell Douglas* paradigm. In Interrogatory No. 2, the jury was presented with a question which, if anything, confusingly squashed together the jury's consideration of questions of "pretext" and "direct evidence." Indeed, Kelley himself argued in his appellate brief, with respect to Interrogatory No. 2, that "*the jury* answered that age was a determinative factor in the decision to discharge Mr. Kelley and thereby *implicitly found pretext*." Kelley's Appellate Brief, at 15 (emphasis supplied).

developed over the course of a ten day trial for the purpose of determining whether . . . [the First Circuit] reached the correct conclusion," Opp. at 20, Airborne's Petition is not seeking a "review [of the] evidence and discuss[ion] [of] specific facts." *Id.* Rather, the focus of any decision by this Court would be on the principle of law that is in conflict between the Circuits.

Of course, in any case involving error by the trial court, the appellate court must ultimately review the entire record to determine whether the error was prejudicial or harmless. *See Stemmons*, 82 F.3d at 821 (concluding that, in light of the bountiful direct evidence of discriminatory bias against the plaintiff, the failure to issue the business judgment instruction was harmless error).[5] This is precisely what the First Circuit did initially. Relying on *Stemmons* and *Walker*, it concluded that the trial court's failure to give the business judgment instruction was error.[6] Opinion No. 1, 56A ("At least one of our sister circuits requires that the trial judge give a business judgment instruction when requested by the

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[5] If the mere threat of having to conduct a harmless error review is sufficient to deter this Court from reviewing an important issue as to what jury instructions in ADEA cases *ought to be*, then this Court would never take a jury instruction issue for review, as Fed. R. Civ. P. 61 on its face always requires harmless error review for alleged errors in jury instructions.

[6] In *Stemmons*, a race discrimination case, the Eighth Circuit reiterated the general rule mandating a business judgment instruction that it had articulated in *Walker, supra*. *Stemmons*, 82 F.3d at 819. However, the *Stemmons* court found that, given abundant, direct evidence of discriminatory animus, failuure to give an instruction on the business judgment rule was harmless error. *Id.* at 821. In doing so, the *Stemmons* court contrasted the record in *Walker*:

> In *Walker*, the plaintiff's case consisted primarily of the testimony of co-workers who indicated that the plaintiff was the most qualified candidate. None of that testimony directly indicated that the plaintiff's age . . . played a part in the hiring decision. In this case, on the other hand, the jury heard testi-

defendant."). Next, the court addressed the issue of whether the error was prejudicial. It concluded that, given the "considerable evidence of conduct by Airborne that might be considered unfair, but that does not suggest discrimination on the basis of age," and the fact that the evidence of age bias was "indirect and far from overwhelming," the refusal to give the instruction "cannot be termed harmless error." 57A.

But in the second opinion, the First Circuit never actually conducted a harmless error analysis. It concluded instead, as noted above, that it was not even error to refuse to give the requested instruction. 32A. Because of this, the First Circuit's second opinion incorrectly assesses the impact that the business judgment instruction might have had on the jury by considering the evidence "in the light most favorable to the verdict winner." 2A, *citing Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 151 (1st Cir. 1990). Of course, if the First Circuit had found error and were undertaking a true harmless error analysis, instead of seeking to find the best argument to justify the verdict, it would have been required to view the record as a whole to determine whether the verdict could have been affected by the error that was made. *La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731, 737 (1st Cir. 1994).[7]

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mony that very strongly suggested that race affected the hiring decision.

Id. Where, as here and as in *Walker*, the determination of unlawful bias turns on the issue of pretext, rather than direct evidence, a jury instruction on the business judgment rule is "crucial to a fair presentation of the case to the jury," and failure to give that instruction is reversible error. *Walker*, 995 F.2d at 849; *Stemmons*, 82 F.3d at 819.

[7] The Court should bear in mind that the issue presented on appeal was not whether there was sufficient evidence to support the jury's verdict. Airborne's appeal did not press the trial court's failure to grant its motion for judgment as a matter of law. Its appellate position was that the trial court's instructional errors were prejudicial. Accordingly, the First Circuit's reliance on

Here, there is a clear basis for finding that the lack of the requested business judgment instruction could not have been harmless error. In addition to the express finding in Opinion No. 1 to that effect, the record as a whole shows that Airborne presented ample evidence to support a finding that Kelley was discharged because of a complete breakdown in his working relationship with Guiod. Such a finding would have permitted a jury finding in Airborne's favor if the jury had been properly instructed to defer to Airborne's business judgment and had not been invited to consider the fairness of discharging an employee shortly after he received a positive performance review. *See Sullivan v. National Football League*, 34 F.3d 1091, 1107, 1109 (1st Cir. 1994) (ordering a new trial where "review of the record as a whole" revealed that erroneous jury instructions were prejudicial; appellant "presented facts that could have led to a dismissal of the case if they were believed by a properly instructed jury[]"), *cert. denied*, 115 S. Ct. 1251 (1995).

C. There Are No Adequate and Independent State Grounds Which Would Preclude This Court's Review of This Case.

No weight should be given to Kelley's assertion that the judgment below was based solely upon state law or that there are adequate and independent state grounds for the

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Cumpiano is misplaced. While viewing the evidence in the light most favorable to plaintiff was appropriate in *Cumpiano*—an appeal challenging the sufficiency of evidence and the factual findings made after a bench trial—Airborne was not arguing sufficiency of the evidence. Accordingly, in this appeal, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." 11 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 2883, at 447 (1995) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762 (1946) and applying standard to civil litigation).

First Circuit's decision. As Airborne pointed out in its Petition at 10 n.6, the trial court specifically directed the jury that its finding on federal law was dispositive of the state law claim: "if you rule in favor of the plaintiff in the federal claim, it's automatic that he wins in the state. You get to the state claim only if he loses on the federal." ADD. 38. Clearly, the jury could not have considered the state law claim "independent" if it was instructed by the Court to find liability on the basis of the federal standard. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (no adequate or independent state grounds when opinion or judgment was based on conclusion that federal law compelled a certain state-law result).[8]

Put another way, by answering Interrogatory No. 2 in the affirmative ("has the plaintiff proved that his age had a determinative influence on the defendant's decision to discharge him"), the jury found that plaintiff had met his "pretext plus" burden under *Hicks*. It was therefore unnecessary for the jury to engage in the "pretext only" analysis that the judge believed was required under Mas-

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[8] The First Circuit was clearly wrong to state that Airborne had somehow waived the business judgment instruction issue with respect to the state law claim. *See* 32A-33A (stating that even if there was error under federal law, the state law claim would be unaffected because "Airborne does not suggest that the failure to provide the business judgment instruction constitutes reversible error under Massachusetts law"). In fact, Airborne specifically argued on appeal that Massachusetts "has likewise adopted the business judgment rule in construing chapter 151B[,] *Smith College v. MCAD*, 376 Mass. 221, 229, 380 N.E.2d 121, 127 (1978)," and that "the need for such an instruction in this case was even greater given the confusing 'pretext only' analysis applicable to Kelley's state-law claims . . . . If the trial court was correct that proof of pretext alone *requires* a plaintiff's verdict under *Blare v. Husky Injection Molding System*, 419 Mass. 437, 646 N.E.2d 111 (1995), clear jury instructions on the meaning of pretext and the business judgment rule were even more indispensable." *See* Airborne's First Circuit Reply Brief, at 13 n.23, 15.

sachusetts law, and per his instructions the jury entered a verdict for the plaintiff on both his federal ADEA claim and his state law claim. Accordingly, Airborne's liability in this case was predicated on a finding under federal law that Kelley's discharge violated the ADEA, and the state-law issues relating to remedies flowed from that finding of liability under federal law.[9]

CONCLUSION

For the reasons set forth in its Petition and this Reply, Airborne respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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[9] At various places in the Opposition, Kelley makes the meritless argument that, because Airborne correctly noted the total dollar liability imposed by the combined judgment to be $3,136,858, that Airborne somehow cannot be challenging the federal law portion of that judgment, but is really challenging a state-law judgment. *See, e.g.*, Opp. at 3, 14. There is no support whatsoever for such a contention, particularly since it is undisputed that liability was found on the basis of a special jury question that was based upon the federal claim, and judgment was entered solely on that basis. For all the reasons stated above and in the Opposition, this case properly and squarely presents the federal issue under the ADEA that is stated in the Question Presented.